Office - Supreme Court, U.S.
FILED
MAR 8 1984
ALEXANDER L. STEVAS

No. 83-954

In the Supreme Court of the United States

OCTOBER TERM, 1983

CONFERENCE OF STATE BANK SUPERVISORS, ET AL., PETITIONERS

v.

C. T. CONOVER, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly upheld the Comptroller of the Currency's regulation, adopted pursuant to the International Banking Act of 1978, authorizing the licensing of federal offices of foreign banks in any state which does not exclude the type of foreign bank office to be established.

2. Whether the court of appeals correctly upheld the Comptroller of the Currency's regulation, adopted pursuant to the International Banking Act of 1978, providing that state law is not controlling on the issue of the permissible activities of federally-licensed interstate offices of foreign banks.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 715 F.2d 604. The opinion of the district court (Pet. App. 48a-62a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1983. An extension of time to file a petition for a writ of certiorari was granted to December 7, 1983, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The relevant facts are fully set forth in the opinions of the court of appeals (Pet. App. 1a-47a) and the district court (*id.* at 48a-62a). Briefly, prior to the enactment of the International Banking Act of 1978 (IBA), 12 U.S.C. 3101-3108, the establishment by foreign banks of offices in the United States was governed solely by state law. Federal law neither provided a national licensing option to such banks nor in any way restricted the scope of the operations such banks conducted pursuant to state law. As a result of this situation, foreign banks experienced certain advantages and disadvantages not shared by domestic banks. For example, foreign banks could open banking offices in as many states as would receive them, an interstate privilege denied domestic banking corporations. On the other hand, few states allowed offices of foreign banks to engage in the full range of banking activities allowed domestic banks. Indeed, the majority of states did not and still do not permit foreign banks to open domestic offices at all (Pet. App. 64a-65a).

The IBA's central goal was to accord foreign banks, as far as practicable, the same treatment accorded domestic banks on a uniform national basis. By way of illustration, for many years domestic banks could choose between state and federal chartering and regulation, whereas foreign banks could operate only under state law. The IBA, for the first time, made available a federal licensing option for foreign bank offices in the United States. IBA § 4, 12 U.S.C. 3102. Section 4 authorizes the Comptroller of the Currency (Comptroller) to license federal branches and agencies and further provides that, unless otherwise specified in the IBA, such offices are to have

the same powers as those of national banks. States retain the power to forbid all foreign bank branches and/or agencies, in which event such federally-licensed offices are not permitted. In addition, federally-licensed agencies are forbidden to receive deposits or exercise trust powers.

As noted above, prior to the IBA foreign banks enjoyed an interstate banking option denied domestic banks. The IBA addresses this situation in Section 5, 12 U.S.C. 3103. Foreign banks operating offices in more than one state must choose (or have designated for them) a "home state". Offices located outside that state ("interstate offices"), whether state-chartered or federally-licensed, may accept only the kinds of deposits an Edge Act corporation may receive (deposits directly related to international trade). Moreover, a federally-licensed interstate branch or agency may be approved by the Comptroller only if "its operation is expressly permitted" by the host state. State-chartered interstate offices, like state-chartered home-state offices, must, of course, be individually licensed by the host state.

2. On November 13, 1979, the Comptroller adopted final regulations and an accompanying interpretive statement (hereinafter collectively referred to as the Regulation) pursuant to the IBA. See 12 C.F.R. Pt. 28 (1981) and 44 Fed. Reg. 65381-65387 (1979). The Regulation was challenged in this action by the Conference of State Bank Supervisors and the Attorney General of the State of New York.[1] The complaint alleged that the Regulation was contrary to law in the following respects:

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[1] The States of Illinois and Washington later joined as plaintiffs. Only the Conference of State Bank Supervisors and the State of Illinois are petitioners in this Court.

A. The Regulation provides that the states' power to exclude *federally*-licensed foreign bank offices is limited to the power to forbid (or, as to interstate offices, simply not "expressly permit") the type of office proposed. Petitioners would further restrict the Comptroller's discretion to license federal offices by at least some of the criteria employed by the states in determining which banks may open state-chartered offices. The most significant of these criteria is reciprocity, *i.e.*, forbidding a specific foreign bank to open an office on the ground that the state's banks are not accorded similar privileges in the foreign bank's home country.

B. The Regulation provides that federal offices (whether home-state or interstate) have all the powers of national banks, with only such exceptions as are set out in the IBA (federal agencies may not receive deposits or exercise trust powers, and interstate federal branches may accept deposits only to the extent that an Edge Act corporation may do so). Petitioners contend that interstate federal offices may engage only in such activities as the host state permits for state-chartered offices of foreign banks.

C. The Regulation provides by negative implication that federally-licensed agencies may accept deposits from depositors who are neither citizens nor residents of the United States ("foreign source deposits"). Petitioners contend that the Comptroller incorrectly interpreted the IBA.

The district court granted summary judgment in favor of the Comptroller and upheld the Regulation. The court of appeals affirmed on the first two points, but reversed on the foreign source deposits issue. The Comptroller has complied with the court of appeals' determination as to foreign source deposits and does not seek review in this Court.

ARGUMENT

The decision of the court below is correct, represents a routine exercise in statutory construction, and does not conflict with the decisions of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. The decision of the court of appeals is consistent with, indeed compelled by, the principle of uniform national treatment that underlies the IBA. See, *e.g.*, S. Rep. 95-1073, 95th Cong., 2d Sess. 2 (1978). IBA affords foreign banks the same option available to domestic banks: a choice between state or federal charter and regulation. Thus, what petitioners attempt to portray as a radical invasion of states' rights is no more than Congress's decision to approximate for foreign banks the same system that has governed our domestic dual banking system for more than a century. This is the manner in which the Comptroller construed the statute, and the court of appeals properly accorded substantial deference to the Comptroller's interpretation. *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

2. Petitioners' two principal arguments are based on factual and legal inaccuracies. First, they argue (Pet. 5) that the Regulation "improperly preempts state authority to make policy determinations concerning fiscal matters." This overblown argument ignores the fact that the decision below has no effect whatever on a state's authority to dispose of its public "fisc"; it also overlooks the significant and unchallenged powers retained by the states, pursuant to Sections 4(a) and 5(a) of the IBA, over the entry and operations of foreign banks. The most important of these are the powers:

a) to exclude offices of foreign banks entirely;

b) to exclude all branches of foreign banks, allowing only agencies (this power is all the more significant in light of the determination of the court below, unchallenged by the Comptroller, that regardless of what state agencies are permitted to do, federal agencies may not receive deposits of any kind);

c) to exclude all agencies of foreign banks, allowing only branches;

d) to exclude all offices of foreign banks except those that make the host state their home state.

In addition, of course, each state retains the plenary power to determine which particular foreign banks, if any, may be granted state-chartered offices, what types of offices will be permitted, how many of these offices there shall be and where they may be located, and what types of business may be transacted at those offices.[2]

In short, each state retains full power to determine what effect foreign bank presence, at federal as well as state offices, will have on the state's banking structure: it may exclude foreign bank offices entirely and, if it admits them, it may determine that they shall be of a deposit-taking variety (branches) or solely of a type that does not accept deposits (agencies). Even the number of offices allowed a foreign bank is contingent upon the state's choice of banking structure. The Comptroller may not allow a foreign bank to have additional offices in a state where, if it were a national bank, it could not have branches; this, in turn, is dependent upon the state's branching pol-

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[2] Of course, interstate offices may not engage in activities that contravene Section 5 of the IBA.

icy. See IBA § 4(h), 12 U.S.C. 3102(h); 12 U.S.C. 36.[3]

The only powers the Regulation denies to the states are: (1) the determination of *which* foreign banks may establish *federal* offices, once the state permits foreign banks to establish the *kind* of office involved (branch or agency); and (2) the restriction of powers of duly established federal offices, beyond requiring that they be operated solely as branches or as agencies.[4] Under the scheme the IBA envisions, states retain more power over the entry and operations of foreign banks than they have or ever had with regard to the establishment and operation of national banks. In light of this broad authority over foreign banks, there is a hollow ring to petitioners' complaint that the absence of still more power over federal offices deprives the states of authority over "fiscal matters" and intrudes upon a state's right to select its own banking structure.

3. Petitioners' second argument (Pet. 5) is that the decision below "frustrates one of the major congressional objectives in enacting the IBA—the removal of certain competitive advantages formerly enjoyed by foreign banks." Petitioners make clear (*id.* at 9-10) that the "competitive advantages" referred to are the advantages of interstate operations that are denied domestic banks. This argument is a gross distortion. While it is true that Congress intended IBA to end certain inequities in treatment, the past

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[3] The number and location of state-chartered branches are, of course, controlled by state law.

[4] States do not have these powers over domestically-chartered national banks, and the absence of such powers does not "preempt" state authority to control "fiscal matters".

inequity addressed by the IBA arose because two or more states could allow the same foreign banks to carry on full banking activities within their borders, providing such foreign banks with complete interstate banking privileges denied domestic banks by the McFadden Act, 12 U.S.C. 36, and, to an extent, by the Douglas Amendment, 12 U.S.C. 1842(d). Section 5(a) remedies this situation by preventing an interstate office of a foreign bank, *whether state chartered or federal*, from taking deposits that an Edge Act corporation may not accept. This severe limitation on interstate deposit-taking effected Congress's intent to achieve approximate equality between domestic and foreign banks. While only foreign banks may have interstate branches and agencies, Congress felt that its restriction on interstate deposit-taking evened the scales sufficiently since, as to other banking activities, domestic banks have alternatives (such as loan-production offices, correspondent relationships, and establishment of Edge Act corporations) that allow essentially equal competition.

The legislative history is consistent with our position. Thus, the Senate Report (S. Rep. 95-1073, *supra*, at 8) clearly focuses on interstate deposit-taking as the key unfair advantage to be dealt with:

> While it cannot be gainsaid that the avenues of interstate activity open to domestic banking organizations are significant and have greatly expanded their ability to compete across State lines, the essence of banking is the ability to receive deposits, and it is in this that foreign banks do enjoy a growing, significant interstate advantage over domestic banking organizations, which cannot receive domestic bank deposits outside of their home State.

Similarly, the Senate Report (at 11) leaves no doubt that express proscriptions in the IBA, not reliance on state control of federal offices, were chosen to remedy the perceived competitive inequality:

> section [5(a)] meets the competitive advantage problem by narrowly focusing on the key interstate advantage enjoyed by foreign banks—the ability to accept deposits at locations in several States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 439292 281